

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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In the Matter of )  
 )  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations. )  
(Wilmington and Mount Sterling, Ohio) )

MM Docket No. 04-161  
RM-10961

To: Assistant Chief, Audio Division, Mass Media Bureau

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**REPLY COMMENTS**

Vernon R. Baldwin, Inc. ("Baldwin") hereby files its Reply Comments in response to the Commission Public Notice, Report No. 2681 (released November 12, 2004), reporting the filing of a counterproposal in the above-captioned docket.

**I. Background**

On August 1, 2003 Baldwin filed a Petition for Rulemaking proposing that Channel 272A be reallocated from Wilmington, Ohio to Mount Sterling, Ohio and that the license of Station WKLN be modified to specify operation on Channel 272A at Mount Sterling, Ohio.

On April 27, 2004 the Commission released a *Notice of Proposed Rule Making* in this proceeding (DA 04-1078) which set June 18, 2004 as the deadline for Comments and Counterproposals.<sup>1</sup> On May 11, 2004 Baldwin filed Comments incorporating by reference its

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<sup>1</sup> On April 28, 2004 the Commission released an Erratum changing the docket number for this proceeding from MM Docket No. 04-162 to MM Docket No. 04-161.

Petition for Reconsideration and reaffirming its intent to apply for the channel if it is reallocated and, if authorized, to build the station promptly. On June 18, 2004, Southeastern Ohio Broadcasting System, Inc. ("Southeastern") filed a counterproposal to downgrade Channel 273B to Channel 273B1 and reallocating Channel 273B1 from Zanesville, Ohio to Baltimore, Ohio, and modifying the license of Station WHIZ-FM to specify operation on Channel 273B1 at Baltimore, Ohio.

## **II. Southeastern Proposal**

The Southeastern counterproposal should be denied since Southeastern's proposed downgrade and reallocation of WHIZ-FM will leave nearly 1,800 people without a second radio service and 10710 people in an area of 636.21 square kilometers underserved.

It has long been established that the public "has a legitimate expectation that existing service will continue." *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (¶ 19) (1990) (hereinafter "*Community of License II*"). The principle that "curtailment of service is not in the public interest is axiomatic." *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); accord, e.g., *TV Corp of Michigan v. FCC*, 294 F.2d 730 (D.C. Cir. 1961); *West Michigan Television v. FCC*, 460 F. 2d 883 (D.C. Cir. 1971).

The Commission has made clear, in considering whether to permit an existing station to change its community of license, the expectation that existing service will continue is a factor that must be weighed "independently against the service benefits that may result from reallocating a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both." *Community of License II*, 5 FCC Rcd at 7097

(¶ 19). Removal of service is warranted only if there are sufficient public interest factors to offset the loss of continued service. *Id.*, citing *KTVO, Inc.*, 57 RR 2d 648 (1984).

The Commission, in establishing its FM allotment priorities, assigned the following priorities (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest factors. Co-equal weight is given to Priorities 2 and 3. *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d (1982) (“*FM Priorities*”). Here, examination of the effect which Southeastern’s proposal will have on existing service leads to the conclusion it must be rejected. The withdrawal of the second full-time aural service available to 1778 people is *prima facie* contrary to the public interest.

For example, in *Pecos, Texas*, 14 FCC Rcd 2840 (Chief, Allocations Branch 1999), the Commission rejected a proposal to change the community of license of Station KKLY from Pecos, Texas to Wink, Texas because, even though KKLY had not yet been constructed, from its authorized Pecos site, the station would provide a first service to 673 people and a second service to 20 people. In light of the fact that retaining the channel in Pecos would serve the highest allotment priority, the proposed relocation to Wink was denied.

Similarly, in *Cheyenne, Wyoming*, 15 FCC Rcd 7528 (Chief, Allocations Branch 2000), the Commission rejected an allotment plan that would have resulted in 211 people losing a potential first aural service from an authorized but unbuilt station. The Commission found that creation of this white area triggered Priority 1 of *FM Priorities*. For that reason alone, notwithstanding the fact it would result in a gray area population net gain of 532 people, the proposal had to be denied. *Id.* at ¶¶ 5&7; accord, *Littlefield, Texas*, 12 FCC Rcd 3215, 3220 (¶9) (Chief, Allocations Branch 2000) (retention of a first aural service to 411 persons buttresses the decision to retain the current allotment arrangement rather than adopt the proposal presented).

Preserving the second radio service available to 1,778 persons serves Priority 2 of the *FM Priorities*. Withdrawing that service in order to permit WHIZ-FM to move to Baltimore, Ohio would disserve Priority 2.

Here, given the size of the gray area population that relocation of WHIZ-FM would create, the public interest dictates that Southeastern's plan to move the station be rejected. The areas losing service are significant in size. The loss area resulting from the substitution of Channel 273B1 for Channel 273B at Zanesville, Ohio and the reallocation of Channel 273B1 from Zanesville, Ohio to Baltimore, Ohio will create an underserved area of 636.21 square kilometers containing 10,710 persons. One thousand seven hundred seventy-eight persons would be left with only one service. The following significant communities in the loss area would be underserved:

<u>Community</u>	<u>Population</u>	<u>Remaining Service</u>
Caldwell, OH	1,956	Two
Belle Valley, OH	263	Two
Sarahsville, OH	198	Four
Summerfield, OH	296	Three
Dexter City, OH	166	Three
Macksburg, OH	202	Three

See Exhibit 1.

Even allotting a first service to Baltimore does not outweigh the significant loss of all but one service to 1778 persons. *Cf. Sells, Arizona*, DA 04-3514 (released November 22, 2004).

While Southeastern argues that the creation of its gray areas are de minimis the cases its cites for this proposition are inapposite. *Washington and Watkinsville, Georgia*, DA 03-2825 (released September 5, 2003), cited by Southeastern for the proposition that "creation of a loss area in which 618 would be left with one full-time aural service was outweighed by the benefits that would result from the proposed reallocation, including a net gain of service to 111,798 persons" is totally

misplaced. The cited *Report and Order* does not so hold. In fact, it is silent on any loss areas that might be involved in the proceeding. Moreover, even if the case so held, 618 is a far cry from the 1778 people Southeastern concedes will be left with only one service.

Similarly, *Freer, Hebbroville and Orange Grove, Florida*, DA 04-717 (released March 19, 2004) was a case which only involved the gray area of 178 persons. Again, a far cry from the 1778 persons to be abandoned by Southeastern.

### **III. Comparison of Baldwin and Southeastern Proposal**

Both the Baldwin and Southeastern proposal will provide a first service to established communities and provide service to significant populations.

Baldwin's proposal must be preferred over the Southeastern counterproposal since the proposed downgrade and reallocation of WHIZ-FM will leave 1778 people without a second radio service and 10710 people in an area of 636.21 square kilometers underserved. Moreover, as noted above, six significant communities lie in the underserved area. Baldwin's proposal creates no underserved areas.<sup>2</sup>

### **IV. Improper Reply Comments of Bexley Public Radio Foundation Should be Dismissed**

On July 2, 2004, Bexley Public Radio Foundation ("Bexley"), an applicant for a low power FM station on Channel 271 at Bexley, Ohio, filed Reply Comments seeking denial of the

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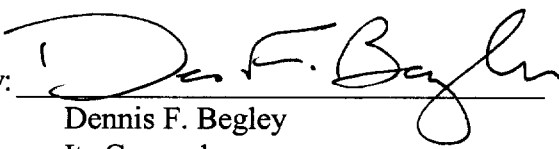
<sup>2</sup> Southeastern challenges Baldwin's claim that its loss area will be well served on the basis that no documentary support is submitted. However, Southeastern presents no engineering data to establish any of Baldwin's loss area is underserved.

Mt. Sterling proposal. The Bexley proposal is deficient on several bases. First, as Bexley recognizes, a low power applicant is not entitled to any protection from a full power FM service. Moreover, the Bexley comments are improperly filed as Reply Comments. Its counterproposal should have been advanced in Comments by June 18, 2004. As such, the Bexley Reply Comments should be summarily dismissed.

### Conclusion

WHEREFORE, in light of the above, it is respectfully requested that the Commission (1) deny the counterproposal of Southeastern Ohio Broadcasting System, Inc.; (2) amend the FM Table of Allotments to reallocate Channel 272A from Wilmington, Ohio to Mount Sterling, Ohio; and (3) modify the WKLN license to specify operation on Channel 272A at Mount Sterling, Ohio.

VERNON R. BALDWIN, INC.

By:   
Dennis F. Begley  
Its Counsel

Reddy, Begley & McCormick, LLP  
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Washington, D.C. 20005-1770  
(202) 659-5700

November 29, 2004

Exhibit No. 1

## **Engineering Statement**

**REPLY COMMENTS TO COUNTERPROPOSAL  
MEDIA BUREAU DOCKET #04-161**

**Vernon R. Baldwin, Inc.**

**WKLN Radio Station**

November 2004

This Technical Exhibit supports the original Petition for Rulemaking filed by Vernon R. Baldwin, Inc. ("Baldwin") to change the allocation of Channel 272A from Wilmington, Ohio to Mount Sterling, Ohio as that community's first local service and order Radio Station WKLN to change its city of license. During the comment period Southeastern Ohio Broadcasting System, Inc. ("Southeastern") counter proposed that instead of the Baldwin proposal that their station WHIZ at Zanesville be reassigned to Baltimore, Ohio and WHIZ be downgraded from a Class B to a Class B1 facility.

Baldwin does not claim any white or gray area coverage of its proposed facility. Also no new white or gray area is located within the WKLN loss area. We also calculate that no white or gray area coverage by the WHIZ proposal. However, as Southeastern has stated there is an underserved area in the WHIZ loss area with some areas being left with as little as 1 station. We differ with Southeastern in their loss area claims. It appears Southeastern used 60 dBu as the protected contour. WHIZ is currently a Class B station and their proposal is to become a Class B1 facility. As such, the protected contours should be calculated as 54 and 57 dBu respectively. The WHIZ present contour is shown assuming their licensed facility and a 54 dBu contour using the FCC's 50/50 curves. The remainder of the stations including the WHIZ proposed facility assume maximum facilities (uniform terrain) in distances to contours<sup>1</sup>.

We assumed that the three Class A AM stations listed have a nighttime interference free contour of 0.5 mV/m. The AM stations contours assume FCC Figure M-3 for distance. We did not find any AM stations with nighttime interference free contours of this area other than those listed.

We show on Exhibit #1 the proposed Southeastern gain area and the loss area. In the loss area there is a rather large underserved gray area. There is a lot of area currently served by WHIZ that by moving and downgrading will change the number of services from adequate served 5 stations to underserved 4 stations. In greater detail we show on Exhibit #2 there is some area with as little as 1 station providing service. The shaded area on Exhibit #1 indicates the area served by 4 or less stations. Exhibit #3 is a tabulation of all fulltime stations providing service to the loss area.

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<sup>1</sup> Some Class A stations operate with a maximum of 3 kW. We determined the 3 kW stations and projected their contours at 3 kW. All other Class A stations assume 6 kW.

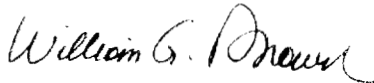


The population of the loss area is 281,673 persons within an area of 9,148.23 square kilometers. The population of the underserved portion of the loss area is 11,008 persons in an area of 643.92 square kilometers.

All of following Ohio communities are in underserved areas:

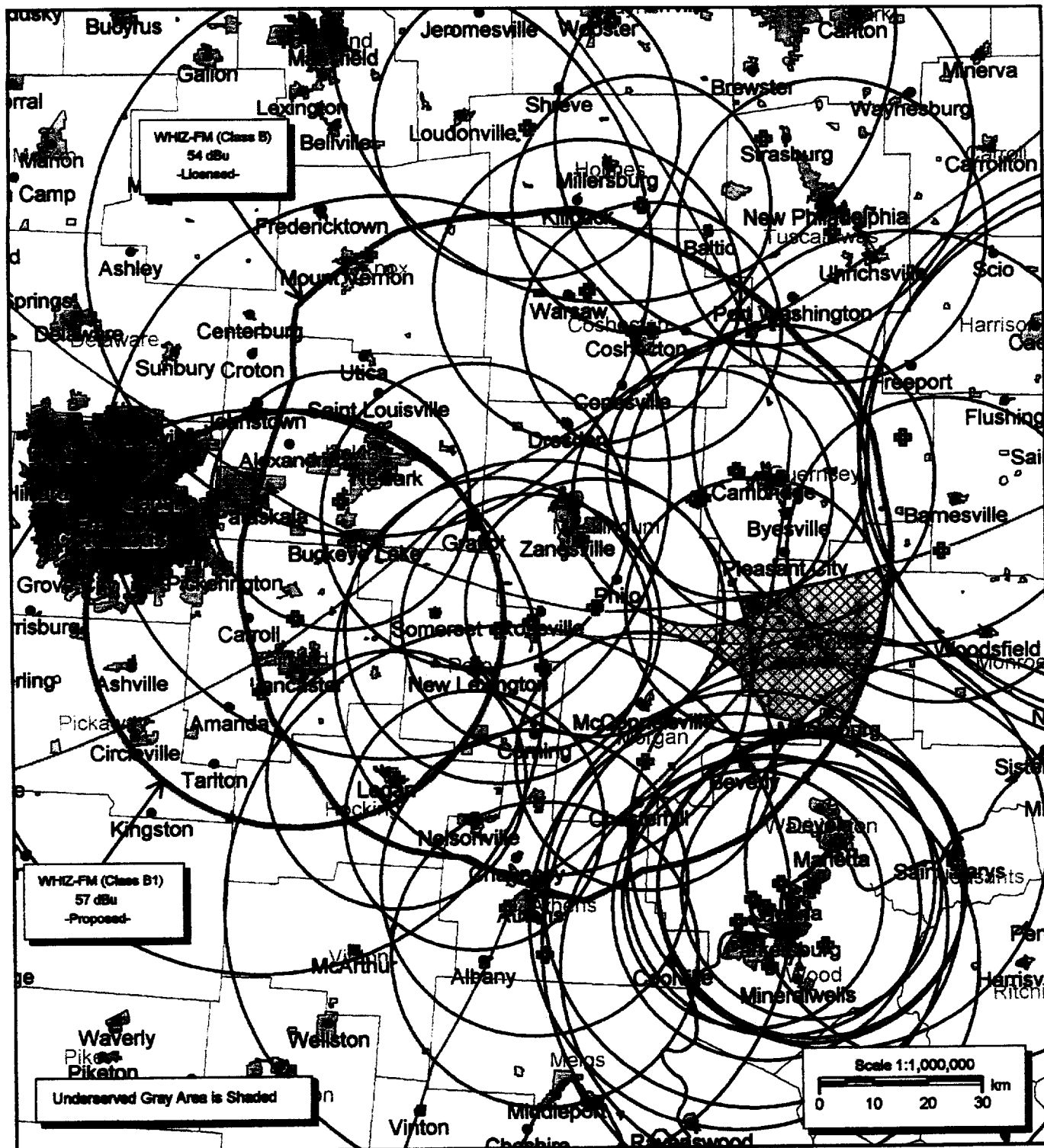
		<u>Population</u>
1. Caldwell	2 Services	1,956 <sup>2</sup>
2. Belle Valley	2 Services	263
3. Sarahsville	4 Services	198
4. Summerfield	3 Services	296
5. Dexter City	3 Services	66
6. Macksburg	3 Services	202

Thus if the Southeastern proposal is adopted, WHIZ would abandon these six communities and their surrounding areas with over 11,000 people and leave them without what is considered adequate service of 5 or more fulltime stations. Our calculations assume a protected Class B contour of 54 dBu and a Class B1 protected contour of 57 dBu.



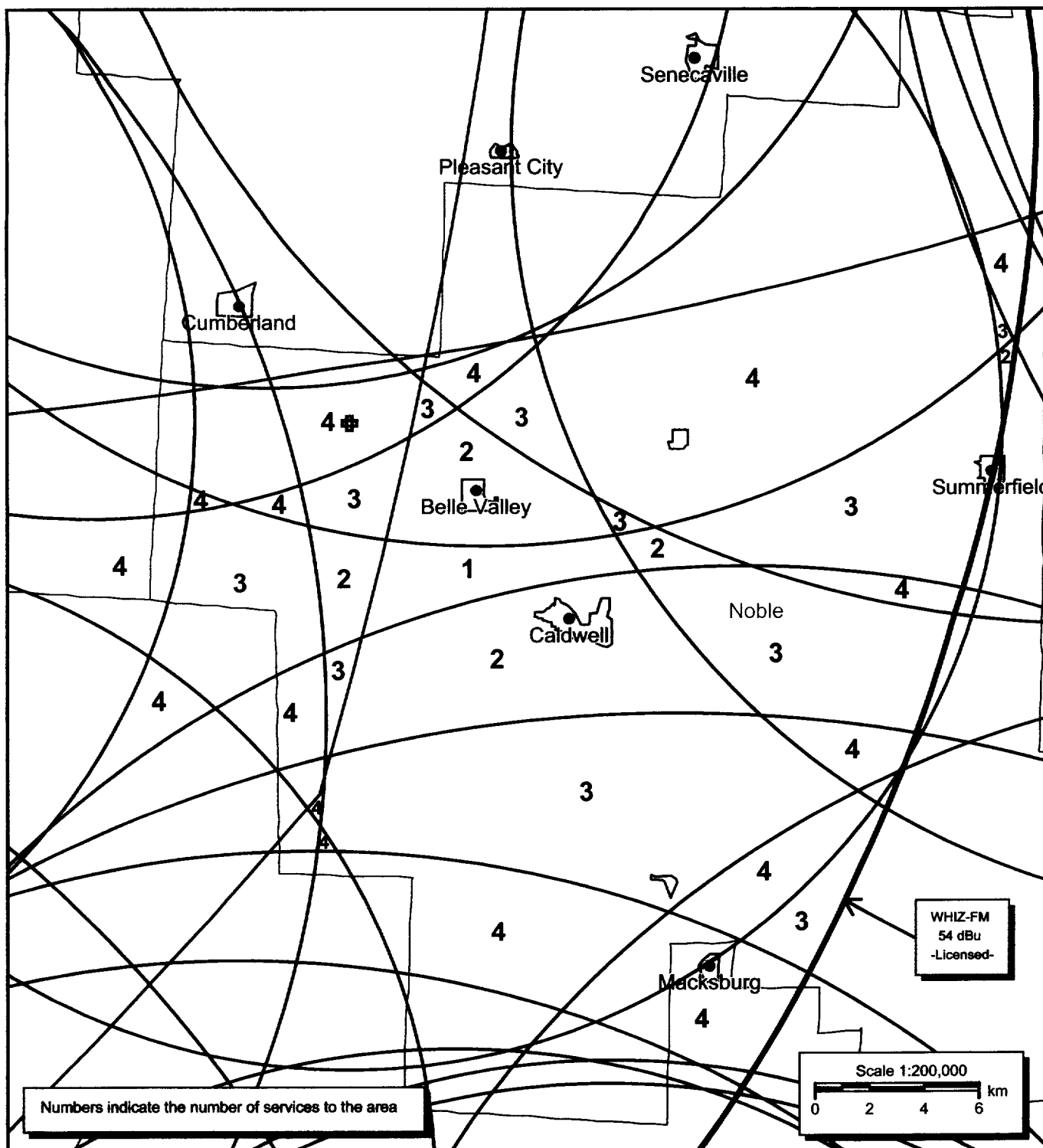
William G. Brown  
Technical Consultant  
Vernon R. Baldwin, Inc.

<sup>2</sup> All community populations assume 2000 US Census.



**EXHIBIT #1**  
**Services to Loss Area**  
**REPLY COMMENTS TO COUNTERPROPOSAL**  
**MEDIA BUREAU DOCKET #04-161**  
**Vernon R. Baldwin, Inc.**  
**WKLN Radio Station**

**Bromo Communications, Inc.**  
 Atlanta, Georgia  
 November 2004



**EXHIBIT #2**  
**Underserved Gray Area**  
**REPLY COMMENTS TO COUNTERPROPOSAL**  
**MEDIA BUREAU DOCKET #04-161**  
**Vernon R. Baldwin, Inc.**  
**WKLN Radio Station**

**Bromo Communications, Inc.**  
 Atlanta, Georgia  
 November 2004

**EXHIBIT #3**  
**REPLY COMMENTS TO COUNTER PROPOSAL**  
**MEDIA BUREAU DOCKET #04-161**  
**Vernon R. Baldwin, Inc.**  
**WKLN Radio Station**  
November 2004

**Tabulation of Services to Loss Area**

<u>Call Sign</u>	<u>Channel/Class</u>	<u>City/State</u>
WLW (AM)	700 (Class A)	Cincinnati, OH
WJR (AM)	760 (Class A)	Detroit, MI
WTAM (AM)	1100 (Class A)	Cleveland, OH
WBIK (FM)	221A	Pleasant City, OH
WBNV (FM)	228A	Barnesville, OH
WBZW (FM)	299A	Loudonville, OH
WCLT-FM	262B	Newark, OH
WCMJ (FM)	244A	Cambridge, OH
WCVV (FM)	208A	Belpre, OH
WCVZ (FM)	224B1	South Zanesville, OH
WDMX (FM)	261A	Vienna, WV
WEGW (FM)	298B	Wheeling, WV
WGGE (FM)	256B1	Parkersburg, WV
WHBR-FM	276A	Parkersburg, WV
WHOK (FM)	238B	Lancaster, OH
WILE-FM	249A	Byesville, OH
WJAW-FM	265A	McConnellsville, OH
WJIC (FM)	219A	Zanesville, OH
WJKW (FM)	240A	Athens, OH
WKLM (FM)	237A	Millersburg, OH
WLGN (FM)	252A	Logan, OH
WMBP (FM)	220A	Belpre, OH
WMCO (FM)	214A	New Concord, OH
WMRT (FM)	202B1	Marietta, OH
WNKO (FM)	269A	Newark, OH
WNUS (FM)	296A	Belpre, OH
WOFN (FM)	204B1	Beach City, OH
WOMP-FM	263B	Bellaire, OH
WOSE (FM)	216A	Coshocton, OH
WOUB-FM	217B	Athens, OH
WOUC-FM	206B1	Cambridge, OH
WOUZ-FM	211A	Zanesville, OH
WOVK (FM)	254B	Wheeling, WV
WQIO (FM)	229B	Mount Vernon, OH

**Tabulation of Services to Loss Area  
(Continued)**

<u>Call Sign</u>	<u>Channel/Class</u>	<u>City/State</u>
WQKT (FM)	283B	Wooster, OH
WRRR-FM	230B1	St. Marys, WV
WRVB (FM)	271B1	Marietta, OH
WSEO (FM)	299A	Nelsonville, OH
WTNS-FM	257A	Coshocton, OH
WTUZ (FM)	260A	Uhrichsville, OH
WVPG (FM)	212B1	Parkersburg, WV
WVVV (FM)	245A	Williamstown, WV
WWJM (FM)	290A	New Lexington, OH
WWKC (FM)	285A	Caldwell, OH
WXIL (FM)	236B	Parkersburg, WV
WXTQ (FM)	288A	Athens, OH
WYBZ (FM)	297A	Crooksville, OH

**CERTIFICATE OF SERVICE**

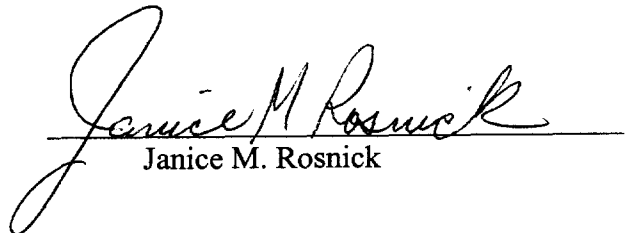
I, Janice M. Rosnick, do hereby certify that I have on this 29<sup>th</sup> day of November, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing REPLY COMMENTS to the following:

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Janice M. Rosnick

\* Hand Delivery